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JAMES H. McKENNEY,

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 117.

DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

ALICE BROOKE, DEFENDANT IN ERROR.

BRIEF FOR APPELLEE.

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THE LAW REPORTER PRINTING COMPANY, WASHINGTON, D. C.

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The Case.

This is a proceeding filed by defendant in error (petitioner) against the District of Columbia, plaintiff in error. The facts appear in the record. Upon presentation of the petition in the trial court the justice directed that a rule be issued to respondent (plaintiff in error) to show cause why the writ of certiorari prayed for in said petition should not issue. Whereupon the plaintiff in error filed an answer, designated "Part 1," and also a return consisting of copies of all its proceedings in relation to the matter in controversy, which return is designated "Part 2" (Rec., pp. 6, 7, and 8).

After hearing arguments of counsel on both sides the trial court directed the writ of certiorari to issue which was accordingly done. To this writ the plaintiff in error (Rec., p. 15) adopted as its return thereto the return to the rule to show cause referred to.

Subsequently the cause came on for hearing and after

a full and complete consideration of the petition and record, and arguments of counsel, the trial court (Rec., pp. 15 and 16) adjudged the assessment to be illegal and void, and quashed said assessment and directed the cancellation of the same on the tax records of plaintiff in error. From this judgment the plaintiff in error appealed to the Court of Appeals where the judgment of the trial court was affirmed and the case is now here on writ of error.

Certiorari is the Appropriate Remedy to Test the Validity of a Tax.

Weed *vs.* Boston, 42 L. R. A., 642.
Wood *vs.* D. C., 6 Mackey, 154.
District of Columbia *vs.* Burgdorf, 6 Appeals D. C., 465.
Mattingly *vs.* D. C., 28 Appeals D. C., 176.
Brandenburg *vs.* D. C., 26 D. C. Appeals, 140; 205 U. S., p. 135.
Gerdes *vs.* Champion, 108 Ills., 137.

The Record is Fatally Defective.

Counsel for defendant in error not having yet received a copy of plaintiff in error's brief, will confine themselves to pointing out to the court briefly:

First, the defects in the record in respect to want of notice to defendant in error of the proposed work for which the assessment was levied, assuming for the sake of argument that the act hereinafter referred to is valid, which is denied; and,

Secondly, the question of the unconstitutionality of the said act of Congress under which the alleged work was done and assessment complained of made.

By act of Congress of May 19, 1896 (29 Stat. at L. 125, chap. 206), Congress attempted to provide a system of compulsory water main and sewer connections.

The act requires notice to be given. Section 4 expressly provides that notice shall be mailed to the nonresident owner if her residence be known. There is no claim here that defendant in error was not a nonresident nor that her address was not known.

The record designated "Return No. 2" discloses that defendant in error's charge is true in this respect. Nowhere in the record does it appear that notice was mailed to defendant in error in conformity with the statute. It does show that a parcel (not a letter) was once mailed, but no *record* shows the contents of that parcel or its application, if any, to the matter in controversy. Had that notice, which the statute requires, been given, it would have been easy to have preserved some record thereof. On the contrary, the record negatives the idea that copy of the notice was mailed to the defendant in error, for the alleged order of the Commissioners (Rec., p. 10), directing that the property be connected, states that the defendant was notified by publication—not by sending copy of the publication to her as by the statute required. It is, therefore, apparent that the failure to mail, post-paid, to the defendant in error a copy of the publication or notice, was an oversight.

The sending of notice, postage prepaid being one of the most important of the essentials of this mandatory statute, any omission by the plaintiff in error in compliance therewith invalidates the whole proceeding.

The *record* fails to disclose that any nuisance existed on defendant in error's property, or that the means of drainage already there was insanitary, insufficient, or inadequate, nor any necessity for making the connection.

Property rights are sacred, and when a person undertakes to exercise dominion over that which is not his he assumes the consequences of his unlawful act as in this case, when the plaintiff in error according to the record, undertook to deal with the property of the defendant in

error without first affording her an opportunity to be heard, the plaintiff in error must abide the result of its unlawful act.

The plaintiff in error appreciating the serious shortcomings of its return in this regard endeavored to cure the serious defects by filing its answer (Rec., pp. 6 and 7), designated "Part 1, Answer to Rule," but this answer, which is on information and belief, can not be considered by the court as a part of the return to the writ of certiorari. Counsel stipulated that the "Return No. 2" of copies of records might be considered by the court in the place and stead of the originals; this negatives any contention which may be made by plaintiff in error that its answer might be considered as part of the return.

In many cases similar to this it has been held that the record, as returned pursuant to the writ of certiorari, should affirmatively show that each step required of the Commissioners of the District of Columbia, or other officers, by the statute, had been strictly and faithfully complied with in every detail, else the assessment or tax is void.

Burgdorf *vs.* D. of C., 6 Appeals, D. C., 470 et seq., the court said:

> "After the writ has been granted and the record certified in obedience to it the questions arising upon *that record* must be determined according to the fixed rules of law."

The court also said:

> "In this case, on the record returned in response to the writ of certiorari, it does not appear that any part of this requirement of the statute has been complied with. It is expressly admitted that there is no record showing any assessment or notice thereof, given. . . . Without this proceeding no liability could arise, and no proceeding could be taken against the property or its

owner. It is essential, therefore, that the *record* should contain strict compliance with the statute in this respect."

Keyser *vs.* D. of C., 3 Appeals, D. C., 31.
Allman *vs.* D. of C., 3 Appeals, D. C., 8.
Johnson *vs.* D. of C., 6 Mackey, page 21.

In Lyon *vs.* Alley, 130 U. S., page 177, which was a tax assessment case from this District, this Court said:

"In the District of Columbia, where a special improvement tax has been imposed, the failure of the commissioner of improvements to deposit with the registrar a statement of the taxes, the failure of the registrar to place without delay in the hands of the collector a list of the persons taxed, and the failure of the collector to give the required notice to such persons constitute such a nonobservance of the requirement of the statute as to render invalid the tax sale and certificates thereof."

Volume 25 Am. & Eng. Encp. of Law (2d ed.), page 1204, the doctrine is laid down thus:

"The effect of the levy of special assessments being to charge the property of the citizen with a burden for the public benefit, it is a well recognized general rule that the provisions of the law must be strictly pursued. The successive steps of the statute are intended for the protection of the property owner and are his safeguards against the exercise of arbitrary power; each act is essential to the exercise of the jurisdiction and each act must be rigidly performed."

And at page 1211 of same work the author says:

"In cases of improvements by municipalities, the statutes generally require some action on the part of the municipality by ordinance or resolution as to the foundation of the proceedings. Such action is indispensable to the validity of the assessments, etc."

The only object of the common law writ of certiorari is to enable the Appellate Court to ascertain *from the record*, first, whether the inferior tribunal had jurisdiction of the subject-matter; and, second, if it had jurisdiction, whether it proceeded according to law. This can be only ascertained from what the record shows, and not by what the respondent might, years thereafter, on information and belief, wish to say about the matter.

Vol. 4, Cycl. Plead. & Prac., page 12:

> "The office of the writ of certiorari is confined to bringing up the record alone, and any matters dehors the record which are returned therewith should be disregarded by the court." Citing many cases in many States.

Same, page 277:

> "The hearing in the absence of statutory authority to the contrary is on the record as returned, and the reviewing court confines itself to an inspection of such record."

Same, page 287:

> "Matters outside of the record will not be considered by the court; the irregularities complained of must appear on the record."

Same, at page 290:

> "All natural and proper conclusions from the record will be indulged, but where the performance of necessary particulars which ought to appear of record is not shown, it will be presumed that the proceedings were irregular in that respect."

Same, at page 11:

> "When issued and served, it becomes the duty of the inferior court or body to whom it is directed to transmit a full and complete transcript of the records and proceedings for which com-

> plaint is made properly certified to the court awarding the writ. It is not the duty of the jurisdiction to which it is directed to certify or return facts dehors the record, but simply the record itself."

Same, at page 282:

> "It is not permissible for the purpose either of determining the merits of the controversy or proceeding, or of showing what transpired before the inferior tribunal to hear oral evidence, or to read affidavits or hear depositions, as they form no part of the record."

Vol. 6, Cycl. Law & Procedure, page 804; 9 Century Digest, sec. 145, page 1891:

> "Where the rules of the common law are adhered to, the writ brings up, and the return can only properly include the record, or proceedings and orders in the nature of a record upon which the determination which is the subject of review was made." Citing many cases in many States.

Vol 6, Cyc. Law Procedure, page 822:

> "Except where otherwise prescribed by statute or authorized by practice, it is the general rule in ascertaining whether or not the inferior court or tribunal had jurisdiction, and proceeded regularly in making the determination complained of, the reviewing court is confined to the consideration of the record returned in obedience to the writ, by which the error, if any, must appear."

The Act is Unconstitutional and Void.

Defendant in error, however, not waiving the foregoing contentions insists that said act of Congress is unconstitutional and void.

This contention is based upon certain salient vices in

the act which are apparent upon its face, of which the principal are:

(*a*) The attempt to give controlling evidential effect to the mere existence of an improvement in case of improved property, and to the ex parte certificate of the Health Officer in the case of unimproved property, thus violating the "due process" clause of the Constitution.

(*b*) Because the act lacks the requisite uniformity inasmuch as it undertakes to provide one law for property of resident and another for property of nonresident owners in said District.

(*c*) Because the act is not capable of universal enforcement, and creates unequal burdens.

(*d*) Because the act is incapable of uniform enforcement as against all property in the District of Columbia.

Perusal of the act will clearly disclose the absolute lack of uniformity which is essential to the validity of such an act even though it be considered that it embodies a lawful exercise of the so-called police power, under the guise of which so many attacks have been made upon the due process and uniformity clauses in the Constitution.

The invalidity of such an act has been shown in the opinion in McGuire *vs.* District of Columbia, 24 Appeals D. C., 22. That case involved the validity of the snow and ice law which the court declared to be most beneficial in its purpose and which the court expressed its desire to sustain, yet it found itself unable to do so, and by unanswerable reasoning determined upon the grounds stated in the opinion that the act was unconstitutional.

See, also, Heylman *vs.* D. C., 27 Appeals D. C., 563.

The act involved in this case is far more vicious in form.

The question in this case is whether this act though falling within the legislative power of Congress is so

framed as that it imposes unequal burdens upon property owners in the District of Columbia and whether its provisions are or not of general or universal application to all persons and property similarly situated.

It will be observed that while the duty to make the connection is the same as to the owners of all lots, the result of the omission to perform such duty in the case of a resident lot owner or owners found within the District is to subject such person to a criminal proceeding while in the case of owners not found within the District who fail to connect the result is to subject the person to a civil and not a criminal proceeding, and the specific duty is cast upon the Commissioners to make such connection and then to assess the cost against the property and collect it as a tax.

In this situation of the provisions of law, the owner of every lot in the District who is a nonresident or not found within the District of Columbia is powerless to defeat the purpose of the law, namely, to have the connection made, because if he fails to do it himself, the Commissioners are required to do it, nor can he escape the cost, because if he fails to pay it, it is assessed against his property and collected as other taxes. In the case of a resident lot owner or a nonresident found within the District, however, *the purpose of the law*, namely, the making property sanitary, may be defeated altogether by the owner refusing to make the connection and submitting to the punishment provided for such omission, inasmuch as the Commissioners have no power in such cases to make the connection themselves and to assess the cost thereof against such property.

So that in the application of the law, it can beyond all question be made effective in the one case, and wholly defeated in the other. This objection is not met by the suggestion that repeated fines will force an owner of the latter class to finally make the connection, because if it

turns out otherwise the property remains unconnected and the purpose of the law, namely, the sanitary drainage of lots is defeated.

If the purpose of the law is to be effective as against all the property coming within this act, then the means to make it so must, of course, be found in the act itself, and yet in the situation described, neither the Commissioners nor anybody else would have any power to enforce such connection as against the resident owner who elects to pay the fine rather than comply with the notice. It is apparent that to make the legislation valid, power should be given to the Commissioners to make the connection in all cases, and to pay the cost out of the emergency fund so that the act shall apply equally to all classes of property, and in the absence of such authority this act furnishes no uniform and effective means for its enforcement, and therefore it fails to subserve the purpose of its enactment. To put it differently, in the act under consideration there is apparently one law, namely, a civil one, for owners not found in the District, and another law, namely, a criminal one, for those who are found in the District. As to one class the Commissioners are given the power to make good the requirements of the law by making the connection, while as to the other class such power is withheld from the Commissioners.

If the language of the law is to be interpreted as though it read, that in case the owner or owners of a lot *can not be found* in the District, leaving out the words "be a nonresident or nonresidents of the District," which is the most favorable construction that can be given to the act, we have two separate and distinct classes of persons to which the law has an unequal application so far as their liability is concerned—to the class found in the District, a criminal liability—to the class not so found, a civil liability; and moreover, as already stated, the law is capable of exact enforcement for the purpose

for which it was enacted as to the class of owners not found in the District, while the contrary is true as to those found therein.

To illustrate:

Suppose a row of buildings, some owned by persons found in the District and some owned by persons not so found; as to one class of property, the act can be frustrated by payment of fine, the Commissioners being powerless to do the thing the accomplishment of which is the sole excuse for the existence of the act. As to the other the purpose of the act may be effected; or take that of tenants in common, some residents and the others nonresidents and note what is possible under the act.

The true view is that a valid act should be uniform in its operation and capable of enforcement in respect of *all property.*

Suppose, too, that property belongs to resident minors or insane persons, or persons under other legal disabilities, can this act be enforced against them, or their property?

The act under consideration absolutely lacks uniformity. It follows that it is unconstitutional and void.

The judgment below quashing the tax, no matter by what reasoning it was reached, was therefore right and should be affirmed.

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